SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC.,

Petitioner,

against

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE ALCOHOL TAX UNIT, TREASURY DEPARTMENT; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY, AND D. W. GRIFFIN, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT, BUREAU OF INTERNAL REVENUE, SECOND DISTRICT OF NEW YORK,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the court below is reported officially in 143 F. (2d) 218 and is printed in the record (R. 971).

II. Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Judicial Code, and Judiciary Section 347(a) (Judicial Code Section 240(a) amended) and under Section 4(h) of the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C. 204 (h)).

The judgment and decree to be reviewed was filed in the Office of the Clerk of the Circuit Court of Appeals for the Second Circuit on July 7th, 1944 (R. 979). Upon application duly made on September 13th, 1944, an order was made by Mr. Justice Jackson of this Court which extended petitioner's time to file this petition to and including December 5th, 1944 (R. 980). The petition is timely within the requirements of Title 28 U. S. C., Section 350 (Judicial Code Section 243).

III. Statement of the Case

A summary statement of the matter involved has been made in the annexed petition for certiorari, pages 2, 2-5, which is hereby adopted and made a part of this brief as a statement of the case.

IV. Specification of Errors To Be Urged

The United States Circuit Court of Appeals for the Second Circuit has erred in ruling that:

(A) the petitioner was not entitled to a Wholesaler's Basic Permit as a matter of right.

(B) a regulation of the Administrator adding to the plain and clear meaning of the statute is determinative of its meaning.

(C) in effect the Administrator's Regulation 1, Section 3(b) of Article II has extended and enlarged the statutory provision as contained in Section 4 (a)(1) of the Federal Alcohol Administration Act, Title 27, U. S. C. 204 (a)(1).

(D) the permit was procured through concealments and misrepresentations of material facts.

(E) under subdivision B of Section 4 (a)(2) of the Act, the Administrator is vested with a broad discretion to

refuse a permit to a corporate applicant some of whose stockholders or officers in the distant past, unlimited as to time, are alleged to have violated a law.

(F) the facts allegedly concealed were material.

(G) the orders of respondents annulling the Wholesaler's Basic Permit of petitioner should be affirmed.

V. Summary of Argument

(A) Petitioner's holding of a basic permit as an importer on May 25, 1935, entitled it as a matter of right to the issuance of a Wholesaler's Basic Permit.

(B) Since petitioner was entitled to a Wholesaler's Basic Permit as of right under Section 4 (a)(1) of the Act by virtue of its possession of an Importer's Basic Permit on May 25, 1935, the alleged misrepresentations or concealments were immaterial.

(C) The power of the Administrator to decline a basic permit is limited by subdivision A of Section 4 (a)(2) to *moral fitness* grounds, and under subdivision B of said section is limited to grounds of inadequacy of a *commercial nature*.

(D) Respondents had no authority to annul petitioner's Wholesaler's Basic Permit upon the grounds of alleged misrepresentation or concealment concerning prior activities of some of its stockholders, officers and directors since by Subdivision A of Section 4 (a)(2) of the Act, prior illegal activities of applicants as a bar to a permit are limited and defined both as to type of offense and time, and under Subdivision B of said section the Administrator's discretion is limited to appraising business potentialities of the applicant persons and not to its stockholders, officers and directors where the applicant is a corporation.

(E) The construction placed upon Subdivision B of Section 4 (a)(2) of the Act by the Respondents and affirmed by the Circuit Court would render this portion of the Act unconstitutional under the Fifth Amendment as a denial of due process.

(F) There were no concealments or misrepresentations of material facts.

VI. Argument

A. Petitioner's holding of a basic permit as an importer on May 25, 1935, entitled it as a matter of right to the issuance of a wholesaler's basic permit.

It is clear beyond any conceivable doubt that Section 4 (a)(1) of the Act entitles any person who, on May 25, 1935, held a basic permit as a distiller, rectifier, wine producer or importer, issued by an agency of the Federal Government, to a basic permit under the Act as a matter of right without further showing, upon application therefor.

Petitioner submits that the clear and plain meaning of this section is that one who held any one of such designated permits on May 25, 1935, was entitled to any basic permit.

On May 25, 1935, petitioner was and still is the holder of a basic permit as an importer of liquors issued on January 13, 1934, by an agency of the Federal Government (R. 771). Hence it was entitled under the Act to a basic permit as a wholesaler. It's right to a basic permit was not limited by statute to a basic permit of a specific or limited type or class. However, the Circuit Court of Appeals in its decision in this case stated:

> "It is apparent from this reasonable regulation, which directly conformed in language to the provisions of Section 4 (a)(1) of the Act, that persons holding basic permits of certain specified types on May 25, 1935,

might obtain new basic permits *of the same class.*" (R. 974) (Italics ours).

The Circuit Court has thus approved the attempted alteration and extension of the statute by the Administrative Regulation to the extent that the regulation has limited the statutory right to *any* basic permit by the holder of a basic permit to new basic permits *of the same class only.* It is a well established rule of law that statutes may not be altered or enlarged by an Administrative Regulation.

The following statement by Chief Justice Waite in *Morrill* v. *Jones*, 106 U. S. 466 is apposite:

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. * * *. The Statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of superior stock. This is manifestly an attempt to put into the body of the Statute a limitation which Congress did not think it necessary to prescribe."

Furthermore, the regulation did not conform in language to the provisions of Section 4 (a)(1) of the Act, as the Act did not specify that the applicant was only entitled to a permit of the same class as already possessed. Indeed, one holding a basic permit would have no need to apply for another permit *of the same class.* This is manifest from the provisions of Section 4 (g) of the Act which continues basic permits without necessity of renewal until there is a surrender, revocation or suspension. The regulation attempts to insert into the body of the statute this meaningless limitation.

Congress distinguished the persons entitled to fall within the application of Section 4 (a)(1) from the succeeding subdivision of the Act when it expressed that "any other person" shall come within the latter subdivision.

It was held in *United States* v. *Goldenberg*, 168 U. S. 95, that statutes should be interpreted so as to be given their plain and clear meaning. This Court said in the case of *United States et al.* v. *Missouri Pacific Railroad Company*, 278 U. S. 269:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case * * * It is elementary that where no ambiguity exists there is no room for construction".

Again this Court said in the case of *Palmer* v. *Hoffman*, 318 U. S. 109, 114:

> "If the act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this court must extend it".

Justice Frankfurter speaking for this Court in the case of *Addison* v. *Holly Hill Fruits Products, Inc.* (*supra*), said:

> "Construction is not legislation and must avoid that retrospective expansion of meaning which properly deserves the stigma of judicial legislation".

Respondents and the decision in the court below attempt to buttress their position by citing from the House Ways and Means Committee report wherein it is stated that

> "All persons who held a basic permit * * * are, under the bill entitled as a matter of right to permits * * * except wholesalers". (H. Rept. 1542 Federal Alcohol Control Bill, P. 8, 74th Congress, 1st Session).

The reference to "wholesalers" in the cited legislative report is to a wholesaler who was not possessed of a basic permit either as distillers, rectifiers, wine producers or importers, whereas petitioner had a basic permit as an

importer. A further reading of the legislative history is convincing on this score.

> "wholesalers held only temporary basic permits at the time of the termination of the code system. The temporary basic permits were issued without the usual investigation. *The other permittees* under the code system were issued permits after they demonstrated that they did not have records as law violaters and that by reason of their previous experience, financial standing, and trade connections they were potential legal members of the industry. (H. Rept. 1542, 74th Congress 1st Session, Federal Alcohol Control Bill, p. 8)" (emphasis supplied).

Petitioner holding an importer's basic permit was one of "the other permittees" mentioned in the foregoing legislative comment and had been fully investigated and passed upon as a prerequisite to the issuance of the Importer's Basic Permit. It was the intention of Congress to allow persons who had already been investigated in connection with the issuance of the basic permits so held by them, the absolute right to any additional basic permits under the Act without further investigation as required under Section 4 (a)(2) of the Act.

Furthermore, Section 4 (a)(1) of the Act clearly expresses this Congressional purpose. There is no ambiguity in the statute. This Court in *Addison* v. *Holly Hill Fruits Products, Inc.* (supra) said:

> "Congressional purpose, as manifested by text and context, is not rendered doubtful by legislative history."

In the case of *United States* v. *Missouri Pacific Railroad Co.* (supra) this Court said:

> "But where the language of an enactment is clear, and construction according to its terms does not lead to

> absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed * * *".

The decision of the Circuit Court of Appeals in this case leads to an anomalous and absurd result. The Government reposes faith and confidence in petitioner as an importer of liquor but not as a wholesaler of the same commodity. In the absence of a reversal of this decision, petitioner is in the unusual position of being licensed by a Federal agency to import and sell liquor from foreign parts but its right to purchase and sell domestic products of the same commodity is denied by the same Federal agency. All statutes should receive a sensible and reasonable construction. Constructions leading to absurd or unreasonable results must be avoided. *U. S.* v. *Katz et al*, 271 U. S. 354.

There was no waiver by petitioner. The fact that the petitioner, when applying for its basic permit as a wholesaler did not insist that it was entitled to the same as a matter of right merely upon showing the possession of its Importer's Basic Permit did not under any principle of law constitute a waiver of its statutory rights, notwithstanding an indication to that effect in the decision of the Circuit Court of Appeals in this case (R. 975).

It follows that if petitioner was entitled to a permit as a matter of right, no issue can arise with respect to whether it was procured through fraud, misrepresentation or concealment of material facts in connection with the application. Such representations or concealments would not be material to the issuance of a basic permit predicated upon the holding by the applicant of another basic permit at the time.

B. Respondent district supervisor had no authority to annul petitioner's wholesaler's basic permit upon the grounds of misrepresentation concerning prior activities of some of its stockholders.

The power of the administrator to decline a basic permit is limited by subdivision A of section 4 (a) (2) to moral fitness grounds, and under subdivision B of said section is limited to grounds of inadequacy of a commercial nature.

The power of the Administrator is statutory and his power to deny a basic permit is derived exclusively from the statute, regardless of his personal inclinations.

No power is found in the Federal Alcohol Administration Act vesting in the Administrator discretionary power to refuse a permit whenever he determines that the applicant does not possess sufficient moral stamina to enable him to maintain operations in conformity with Federal Law.

Consequently, if the facts found by the Administrator as having existed had been disclosed by the applicant, the Administrator would not have had the discretionary power to refuse the permit.

The statute manifests a deliberate purpose by discriminating language on the part of Congress to withhold from the Administrator unlimited discretion.

The legislative history of the Act amply supports this construction. Representative Cullen, Chairman of the subcommittee which considered the bill for the House Ways and Means Committee, introduced the same in the House. During the discussion of the bill in the House on July 23rd, 1935, he said:

> "Further wherever power is granted by the bill to put into effect a policy contemplated by the bill, discriminating language has been used so that the bill, if enacted, will not suffer from the infirmity of invalid dele-

gation of legislative power". (74th Congressional Record page 11714).

A suggestion for liberal construction of the statute in favor of broader powers for the Administrator is not embodied in the Act. The statute is designed primarily for the purpose of regulating commerce and the protection of revenue. (Federal Alcohol Administration Act, Section 3, Title 27, U. S. C. 203, House Ways and Means Com., Report to 74th Congress 1st session HR1542, page 1, bill 8870).

A mandatory directive is made in Section 4 of the Act which requires that permits be issued to all persons unless excluded for specified reasons as set forth in the several subdivisions of this section. Significantly, the enacting authorities specified and limited the power of the Administrator separately in each subdivision of the section as to each phase of the function of granting and denying the permits. A brief analysis of this characteristic of the section involved serves to emphasize the Congressional purpose.

Subdivision (a)(2) of Section 4 of this Statute is written in three distinct parts designated as "A", "B" and "C" respectively. To each part a clear and specific classification of cause for refusing a basic permit is assigned.

Subdivision C concerns itself with proposed operations in violation of State laws, and is consequently not material to our discussion.

Subdivision A authorizes refusal of a permit to applicants who had been law violators as established by conviction. This subdivision finds its genesis in the following suggestion of the House Ways and Means Committee.

> "These requirements are desired to exclude from the industries persons who would be likely to violate provisions of the bill and other Federal and State laws". (H. Report 1542, Federal Alcohol Control Bill, page 8, 74th Congress 1st session).

This subdivision of Section 4 is the *moral fitness clause* from which the Administrator draws power to exclude those applicants of determined objectionable moral fiber.

In subdivision B of Section 4 (a)(2), the Act concerns itself exclusively with the *business or commercial* aspects of the applicant. From this subdivision the Administrator draws his power to exercise judgment and discretion as to fitness of the applicant from the business or commercial point of view.

The decision of the Circuit Court of Appeals in this case surprisingly holds, however, that subdivision B of Section 4 (a)(2) of the Act empowers the Administrator in his discretion to refuse to issue a basic permit where a stockholder of the applicant in the unlimited past has violated a law.

Clearly such a construction of the statute renders subdivision A thereof a nullity. Moreover, its consequence is an absurdity, as it would place a greater burden on mere suspects than on convicts, hence is in conflict with the established rules of construction. *United States* v. *Katz, et al.* 271 U. S. 354.

The legislative history of these subdivisions of the Section as revealed by the House Conference Reports is particularly illuminating in this direction. The House Conference Reports disclose that the House Bill

> "provided that applicants * * * should not be entitled to the permit if it were found that the applicant had within five years * * * been convicted of a felony. The Senate amendment adds an additional requirement that the applicant must not have been convicted in such period of a violation of a Federal law relating to liquor * * *. The house recedes with an amendment providing that the applicant must not have been convicted within a period of three years * * * of a misdemeanor under Federal Laws relating to liquor * * *" (excerpt from H. Conference Reports

1898, vol. 4, page 10, 74th Congress 1st session repor to accompany H.R. 8870).

Thus, the five year limitation as proposed by the Senat amendment for the violation of a Federal law relating t liquor was limited and reduced by the House and finall passed with a limitation period of three years involvin a misdemeanor under Federal laws relating to liquor. There can be no mistake that Congress enacted the bill in fina form with the purpose of limiting the time within whic prior misdeeds of applicants should be a bar to the issuanc of a basic permit. Congressional awareness of time limita tions as to past illegal acts in connection with this enact ment and its deliberate purpose to circumscribe the effect thereof upon the issuance of basic permits is so apparen as to allow for no controversy. It is further illustrated b the fact that the enactment did not specify misdemeanor generally as a bar to a permit but limited it to misdemeanor arising only out of Federal liquor laws. And then, thi specific type of misdemeanor is a bar only if the conviction therefor was had within three years from the time of th application. Despite this, however, the decision of the Cir cuit Court of Appeals in this case allows to the Administra tor broad discretionary power to refuse a basic permi when he finds some evidence that the applicant in the un limited past has committed a law violation which has no even been established by conviction.

The provisions of subdivision B of Section 4 (a)(2) ar concerned with "business experience", "financial stand ing" and "trade connections" of the applicant. The clea meaning of the terms "business experience", "financia standing" and "trade connections", particularly in view o the context of the words "financial standing" as used be tween these terms in subdivision B precludes a construc

tion which authorizes refusal of a permit under this subdivision on *moral fitness* grounds. The terms could only be used in a *commercial sense* according to their natural and ordinarily accepted use and meaning. Websters New International Dictionary, Second Edition 1944, defines,

"TRADE —Act or business of exchanging commodities by barter, or by buying and selling for money; commerce traffic."

"BUSINESS—Any particular occupation or employment engaged in especially for livelihood or gain."

This Court in the case of *Helvering* v. *Hutchings*, 312 U. S. 393, 396, has held that the Supreme Court in construing a statute will assume that Congress intended to use the words thereof in their natural sense. The plain meaning of a statute has great weight in statutory construction.

Again it has been held in the case of *Addison* v. *Holly Hill Fruits Products, Inc.* (supra):

> "* * * nor is English speech so poor that words were not easily available to express the idea * * *. After all, legislation when not expressed in technical terms is addressed to the common run of men * * *".

The context and language of this subdivision of Section 4 (a)(2) indicates Congressional concern with the business potentialities of the applicant. In this subdivision, as well as in the succeeding sections of the Act (4D, 5, 6; 27 U. S. C., Sections 204D, 205, 206), there is plainly stated the Congressional interest in the business or commercial aspects of the applicant's qualifications. These sections specify particularly the requisite elements that business operations be commenced within a limited time so that there will be conformance with Federal law and generally seek to

obviate the possibility of interlocking corporate directorates of an applicant with other permittees; the elimination of restraints of trade and all other objectionable *commercial* practices.

The statute by the term, "to maintain operations in conformity with Federal law" does not vest the Administrator with the unlimited power to refuse a permit to one who in the distant past violated any law. The context of this phrase shows Congressional reference to *business* or *commercial* probabilities of the applicant. The yardstick to determine eligibility with respect to *moral fitness* based on past activities is set up and established in the preceding subdivision of the section (4(a)(2)(A)). By the requisite standards expressed in the statute in the use of the phrases "business experience", "trade connections" and "financial standing", Congress expresses an intent to require the issuance of permits to those most likely to maintain financially successful establishments. Generally a more successful business is less likely to violate the law under which it operates. It is reasonable to argue that were it the Congressional intent to authorize discretionary power to bar permits under subdivision B of Section 4 (a)(2) because of unspecified law violations in the unlimited past or for infamous past activities or associations, it would have so clearly stated. The phrases of business and commercial significance, "business experience", "trade connections" and "financial standing" would not have been used for that purpose. The legislative history and draftmanship of the statute show that it has been drafted with discriminating care in the use of language and the creation of scope of authority. (Statement by Congressman Cullen, 74th Cong., 1st Session, Record Page 11714 *supra.*)

From context and language the conclusion is that this subdivision was not intended to be used to "screen out"

applicants whose history show illegal activities or associations. By the statutory use of the terms "business experience", "trade connections" and "financial standing", there was not directed a searchlight on past illegal and clandestine activities of applicants. Such activities do not connote business experience, or trade connections, or financial standing.

As used in the statute, the terms "business experience", "trade connections", "financial standing" refer to qualifications of the applicant person and in case of a corporation does not embrace officers, stockholders or directors.

The applicant, at the time of the application, was and still is a corporation conducting a large business as an importer of liquors (R. 772). Under the statute, the Administrator in passing on the application was to be concerned with the business experience of this corporate applicant, its current trade connections and its financial standing. Subdivision B of Section 4 (a)(2) of the Act (Title 27, U. S. C. 204 (a)(2)(B)). The applicant's ability to commence operations under the permit applied for was dependent on whether this corporation had financial standing, the extent of its business experience or activites and its trade connections. These were elements which the Administrator could use as guideposts in determining the business potentialities of the applicant *after* he had determined under subdivision A of Section 4 (a)(2) of the Act that there were no disqualifying elements involving convictions of any of its stockholders, officers or directors.

That under subdivision B of Section 4 (a) (2) the business potentialities of the corporate applicant only are under scrutiny is clear from the statutory language and context.

For the purpose of instant clarification, we quote the relevant parts of the two subdivisions.

Subdivision A	*Subdivision B*
"That such person (or in case of a corporation *any of its officers, directors or principal stockholders*) has within five years prior to date of application been convicted of a felony under Federal or State law • • •."	"That such person is by reason of his business experience, financial standing or trade connections not likely to commence operations within a reasonable period or to maintain such operations in conformity with the Federal law."

The exclusion of the reference to officers, directors or principal stockholders under subdivision B, after its presence in the preceding subdivision, precludes inclusion by implication.

This Court speaking through Mr. Justice Holmes in *United States* v. *Atchison T. & S. Railway Company*, 220 U. S. 37, made relevant comment on this subject as follows:

> "The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied."

Manifestly the words "business experience," "financial standing" and "trade connections" refer to the corporate applicant and not to its officers, directors or stockholders.

The petitioner, a corporate applicant, had been operating as an importer of liquors for some time past (R. 771) and its current trade connections were to be considered.

It follows that had the facts allegedly concealed or misrepresented concerning the officers, stockholders or directors been disclosed, the Administrator would not have had the statutory authority to refuse a permit under subdivision B of Section 4 (a)(2) of the Act, and the statements consequently were immaterial. (*Matter of Farley*

v. *Miller*, 216 N. Y. 449). It must, therefore, be submitted that the permit was not procured through fraud, misrepresentation or concealment of material facts and no authority existed for annulment under Section 4 (e) of the Act.

C. The construction placed upon subdivision B of section 4(a) (2) of the act by respondents and affirmed by the Circuit Court would render this portion of the Act unconstitutional under due process.

The decision of the lower court to the extent that it approves and confirms the discretionary power arrogated by the Administrator under subdivision B to refuse a permit because of prior illegal acts of a stockholder of a corporate applicant is in conflict with the due process clause of the Fifth Amendment to the Constitution because it is unreasonable, capricious, discriminating and arbitrary.

Nebbia v. *Peo. of the State of New York*, 291 U. S. 502.

The means selected have no real, appropriate and substantial relation to the objects sought to be attained.

Virginian Railway v. *System Federation*, 300 U. S. 515; *Currin* v. *Wallace*, 306 U. S. 1, 14.

This conclusion is inevitable since the decision holds that there is a right to bar a permit under subdivision B of the section for past law violations when the clear object and purport of the subdivision by the use of the terms "business experience," "trade connections" and "financial standing" is a sifting of applicants on the basis of *commercial* ability to operate the proposed licensed business in conformity with Federal law. An Act should not be construed in a manner so as to render it unconstitutional when a Constitutional construction is possible. *El Paso & N. E. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

D. There was no concealment or misrepresentation of material facts.

It is, of course, basic that the facts alleged to have been misrepresented or concealed must have been material in order to justify proceedings and annulment after issuance of the permit.

The essence of such proceedings and object is the procurement of the permit which otherwise would not have been granted but for the alleged misrepresentations or concealment. The comment by the New York Court of Appeals on this question is here appropriate.

> "The statement in the application upon which the order was based, even if untrue, was wholly immaterial, and an order revoking a license for a false statement cannot be predicated upon such a representation."
>
> *Matter of Haukins*, 165 N. Y. 188.

The concurring opinion of Judge Pound of the highest court of the State of New York in *Farley* v. *Miller*, 216 N. Y. 449, in dealing with an attempt to revoke a liquor certificate for alleged untruthful answers of the applicant in connection with its application, pointedly observed (at p. 458):

> "I concur in the result on the sole ground that, under the rule laid down in Matter of Moulton (59 App. Div. 25; affd., 168 N. Y. 645), although the answers to questions No. 11 and No. 34 were false, applicant would have been entitled to his certificate if he had stated the facts correctly, and the statements were, therefore, immaterial."

The authorities and discussion as set forth in our Point B hereof amply support our position that the commercial information and standards as prescribed in subdivision B of Section 4 (a)(2) of the Federal Alcohol Administration Act did not apply to the officers, directors or stock-

holders of the corporate applicant. The requirement of such information by the Administrator either in the application form or otherwise does not make material that which under the statute is not material. By Administrative Regulation the statute could not thus be altered or extended. *Morrill* v. *Jones* (supra).

Facts not material to the issuance of the permit may be sought in an application form or otherwise for statistical or other administrative reasons.

There were no undisclosed or unacceptable interests or persons.

It may not be successfully disputed that within the full meaning of the corporation law of the State of New York wherein the petitioner had been incorporated, the individuals named in the application as officers, directors and stockholders were such and had the rights and powers attributed to them according to the records of the applicant corporation and pursuant to law. The information, consequently, was correctly furnished in the application. The persons credited in the application with status as officers, directors and stockholders held such status formally and by corporate record. A failure to so list them would have been contrary to the records of the applicant and a misstatement. *Bombal* v. *Peoples State Bank*, 367 Illinois 113; *Doran* v. *Bay State Distributing*, 36 F. 2nd 657 (C. C. A. 1st).

Undeniably, all parties were actually disclosed in the application and could have been subjected to the routine of investigation. As a matter of fact they had been subject to investigation by the Administrator before issuance of the importer's permit (R. 83 & 771).

That the Administrator recognized the immateriality of the information alleged to have been concealed or misrepresented is disclosed by the fact that the Administrator

subsequently approved of Rappaport's ownership of stock by the failure of the Administrator to object to the transfers of the stock by SAMUEL BOMZON to SAMUEL W. RAPPAPORT (R. 683, 685, 695, 697). These transfers were reported to the Administrator and due note thereof was made by him as disclosed by his acknowledgments thereof (R. 684, 686, 699). Thus, without objection, the Federal Alcohol Administration had before it the full extent of the interest of SAMUEL W. RAPPAPORT in the applicant first as Vice-President and director, subsequently and prior to the commencement of the annulment proceedings as a major stockholder.

In addition to the foregoing it is briefly urged that the information sought as to applicant's officers, directors and stockholders concerning prior experience in the liquor industry (R. 88) quite naturally alluded to experience acquired under permit or license, in short, legitimate business experience. A request by a government authority for "business experience" involves business experience as distinguished from illegal activities. *United States* v. *Katz, et al.* (supra); *United States* v. *Jim Fuey Moy*, 241 U. S. 394.

Conclusion

It is respectfully submitted that the petition herein for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit should be granted, and that the said judgment and decree be reversed, and that the orders annulling petitioner's basic permit as a wholesaler should be set aside.

Respectfully submitted,

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